**MEMORANDUM OF AGREEMENT**

**SO THAT THE PUBLIC MAY KNOW:**

This**MEMORANDUM OF AGREEMENT**is made and entered into this \_\_ day of \_\_\_\_\_\_ 2018 in the City of Manila, Philippines, by and between:

the **[AGENCY]**, a national government AGENCY existing under the laws of the Philippines, with office address at **[ADDRESS]** hereinafter referred to as the **“AGENCY”**;

* and -

the **PROCUREMENT SERVICE,** a government AGENCY duly organized and existing under the laws of the Republic of the Philippines with office address at PS Complex, Cristobal Street, Paco, Manila, represented by its **Executive Director, BINGLE B. GUTIERREZ**, hereinafter referred to as the **“PS”**.

The**AGENCY** and the **PS** are collectively called “Parties” and individually called “Party” to this Agreement.

**ANTECEDENTS**

The **AGENCY** intends to procure **[ITEM | PROJECT]** with Approved Budget for the Contract (ABC) of **[value]**, hereinafter referred to as the “Project.”

The **AGENCY** decided to tap the services of the **PS** as Procurement Agent to undertake all of the **AGENCY**’s procurement activities for the Project/s.

Republic Act No. 9184 (RA 9184), otherwise known as the “Government Procurement Reform Act,” which became effective on 26 January 2003, including its associated revised Implementing Rules and Regulations (IRR), provide for the rules and procedures to be followed in the conduct of government procurement activities.

RA 9184, while authorizing the **AGENCY** to conduct its own procurement activities, provides for certain instances where assistancefrom other government agencies may be sought. Section 7.3.3 of the 2016 IRR of RA 9184 provides:

7.3.3 In order to hasten project implementation, procuring Entities which may not have the proficiency or capability to undertake a particular procurement, as determined by the HoPE concerned, may outsource the procurement tasks by:

a) Requesting other GoP agencies to undertake such procurement for them, through the execution of a memorandum of agreement containing specific arrangements, stipulations and covenants, in accordance with government budgeting, accounting and auditing rules;

xxxx

The **AGENCY** is the Procuring Entity, solely and directly responsible for contract implementation under this Agreement. The **PS** shall be responsible for bidding out the Projects up to recommendation of award to the **AGENCY**.

The **PS** agrees to undertake the procurement activities of the Projects of the **AGENCY** regardless of the modality involved, whether through RA 9184 procurement or through ODA arrangement, subject to the terms and conditions provided hereunder.

Accordingly, for and in consideration of the foregoing premises and the mutual obligations, stipulations, and agreements in this Agreement, the **AGENCY** and the **PS** agree to contract as follows:

**ARTICLE 1**

**SCOPE AND APPLICABILITY OF THIS AGREEMENT**

* 1. This Agreement shall govern the procurement activities and the contract implementation to be undertaken by the **PS** for the **AGENCY** pursuant to Section 7.3.3(a) of the 2016 IRR of RA 9184.
  2. RA 9184 and its 2016 IRR shall govern the procurement activities under the Projects. The relevant budgeting, accounting, and auditing rules and regulations, and other pertinent administrative issuances shall be applied in the execution of the Projects under this Agreement.
  3. This Agreement shall be effective at the time of its signing. The procurement activities will commence upon the **AGENCY**’s submission of the following documentary requirements and funding requirements as mentioned in Article 4 of this Agreement:
     1. The **AGENCY** Annual Procurement Plan (APP) and approved AGENCY Procurement Request (APR) for the Projects to be bid out;
     2. Technical Specifications, Terms of Reference (TOR), or Project Requirement for the Projects with approved budget for the contract duly certified correct by the Head of the Procuring Entity (HOPE), as defined in this Agreement;
     3. Other documentary requirements, as may be necessary, subject to additional conditions provided for under Article 2 of this Agreement.
  4. The **PS** reserves the right to make changes to the Bidding Documents, which includes the Technical Specifications, TOR, or other Projects Requirements, as it may deem necessary to promote competition and to ensure compliance with RA 9184 and its IRR.

**ARTICLE 2**

**APPROVED BUDGET FOR THE CONTRACT (ABC) AND**

**PROJECT COST ESTIMATE (PCE)**

* 1. The PCE is the amount reflected in the APP and/or other relevant documents. The ABC, which shall not exceed the PCE, shall be the amount to be reflected in the bidding documents for purposes of procurement activities for the Projects. The contract award shall not exceed the ABC consistent with the provisions of the 2016 IRR of RA 9184.
  2. Based on its price monitoring, the PS shall determine the ABC in consultation with the **AGENCY.**
  3. The ABC shall be net of the **PS** Service Fee as provided under Article 3 hereof. The Service Fee shall be taken from the PCE.

**ARTICLE 3**

**PS SERVICE FEE**

* 1. A four percent (4%) Service Fee to be computed on the basis of the contract award price shall be imposed for services to be rendered by the **PS** and its BAC. The Service Fee shall be taken from the savings of the procurement, or the MOOE of the AGENCY, and shall accrue to the **PS** after contract signing.

The **AGENCY** similarly undertakes to ensure the availability of the funding for the Service fee, in the event that no savings accrue from the procurement.

Immediately after contract signing, the **PS** may bill the **AGENCY** for the payment of Service Fee.

* 1. In case a Project is cancelled by the **AGENCY** pursuant to Article 9 of this Agreement or it is cancelled due to the in/actions of the **AGENCY** regardless of cause, after the procurement process has already commenced and with no fault on the part of the **PS**, all attendant costsand expenses of conducting the procurement, *e.g.*, cost of publication, reproduction of documents, meals, overtime pay, and other costs incidental thereto, shall be for the account of the **AGENCY**. In this case, the **PS** shall bill the **AGENCY** for the expenses incurred which shall be deductible from the PCE.

**ARTICLE 4**

**FUNDING AND COMMENCEMENT OF PROCUREMENT ACTIVITIES**

* 1. It shall be the responsibility of the **AGENCY** to request the release of the corresponding cash allocation from the Department of Budget and Management (DBM).
  2. The funding commitment by the **AGENCY** and its submission of documentary requirements under Article 1.3 of this Agreement shall be sufficient basis for the **PS** to commence procurement activities under the APR.
  3. For the duration of the procurement activities until contract implementation and close-out, the **AGENCY** shall be solely responsible for the maintenance and availability of the funds or appropriations to support the project towards its full completion.

**ARTICLE 5**

**THE PS AND ITS BAC**

* 1. The**PS**, through a Bids and Awards Committee (BAC), shall facilitate and conduct the procurement activities, *i.e.*, from procurement conference, advertisement, selection process, evaluation, post-qualification and recommendation of award of contract to the HOPE. It shall likewise implement and monitor the contract until accomplishment of Projects and corresponding payment to the contractors or consultants.

The **PS** and its BAC shall prepare the necessary documents related to these procurement activities and contract implementation.

* 1. The **PS** BAC shall be composed of five (5) members: Chairperson, Vice-Chairperson, a regular member, a technical member from the **PS**, and one (1) provisional member/end-user to be identified by the **AGENCY**.
  2. The BAC shall create a Joint **PS-AGENCY** Technical Working Group (Joint TWG) for the Projects. The Joint TWG shall be composed of three (3) technical personnel: one (1) representative from the **PS** as Joint TWG Head, and two (2) technical representatives from the **AGENCY**.

The**PS** and the **AGENCY**, however, may send additional technical representative/s during bid evaluation and post-qualification. For purposes of preparing the necessary reports, recommendations, and honoraria, if any, all officially designated representatives to the Joint TWG shall be accountable, responsible, and entitled to honoraria.

* 1. The**PS** and its BAC shall ensure that the evaluation and post-qualification of bids shall be limited to those documents and papers specifically provided in the bid documents and TOR submitted by the **AGENCY**. No other parameters shall be considered unless it is contained in the aforementioned documents.
  2. The**PS** shall be liable for all costs that may be incurred during the conduct of bidding, *e.g.*, publication fees including costs that may be incurred during the conduct of post-qualification, except in case a Project is cancelled as provided for under Article 3.2 of this Agreement.
  3. It shall be the primary responsibility of the **PS** and its BAC to ensure that the rules and regulations prescribed under RA 9184 and its IRR are strictly observed and followed in the conduct of procurement activities. All issues relative to the rules and procedure, including interpretations of the procurement rules, shall be under the sole authority of the **PS** and the BAC.
  4. The designated provisional members of the BAC and TWG shall be entitled to honoraria, as authorized under pertinent DBM Circulars on the subject. The**PS**shall be responsible, on its own account, for the payment of honoraria to the members of the BAC and the Joint TWG.
  5. It is understood that the Procuring Entity as defined under Section 5(bb) of the revised IRR of RA 9184 is the **[AGENCY]**, and the HOPE as defined under Section 5(t) of the same IRR is the **[AGENCY]** Head or her authorized representative.

**ARTICLE 6**

**THE AGENCY**

* 1. After the signing of this Agreement but before the pre-procurement conference, the **AGENCY** shall provide the **PS** and certify as to the breakdown of its cost estimate for the Projects.
  2. The **AGENCY** shall be responsible for the preparation of the Technical Specifications, TOR, Projects Requirements, and any other document as may be deemed necessary for the conduct of the procurement activities in accordance with Article 1.3 of this Agreement.
  3. Subject to the provisions under item Article 5.2 of this Agreement, the **AGENCY**’s representative or its designated alternate is entitled to one (1) voting seat in the BAC and serves as a provisional member thereof. The designated **AGENCY** provisional BAC member shall participate in all deliberations and meetings of the BAC.
  4. The **AGENCY** shall designate two (2) technical personnel to serve as members of the Joint TWG as provided in Article 5.3 of this Agreement.
  5. The **AGENCY**’s provisional BAC member and Joint TWG members shall sign all the required documents/reports.
  6. The **AGENCY** shall strictly adhere to the Technical Specifications, TOR, Feasibility Study, Detailed Engineering and Design, Delivery Schedule, and such other related procurement documents forming part of the Bidding Documents alongside award of contract to the winning bidder.
  7. The decisions and commitments relative to the Projects made by the **AGENCY**’s provisional BAC member and designated TWG members shall bind the **AGENCY**.

**ARTICLE 7**

**CONTRACT IMPLEMENTATION**

* 1. The Contract implementation during the lifetime of the Project shall be the primary responsibility of the **AGENCY**. The **AGENCY** may call upon the **PS** to assist in the resolution of issues during contract implementation and the **PS** shall provide such assistance.
  2. In case of default on the part of the contractor or failure of bidding, the **PS** guarantees to immediately commence the re-bidding or procurement process at no additional cost to the **AGENCY**.

**ARTICLE 8**

**PROCEEDS OF FINES AND PENALTIES**

* 1. The proceeds of the forfeiture of the bid security, if any, shall be for the account of the **PS.**
  2. The proceeds of the forfeiture of the performance bond, warranty bond, and liquidated damages for delayed deliveries, if any, shall be for the account of the **AGENCY**.

**ARTICLE 9**

**TERMINATION/RESCISSION**

* 1. The Parties may rescind this Agreement, in whole or in part, under any of the following causes:
     1. If the implementation of the Project is economically, financially, or technically impractical, as determined and approved by the **AGENCY**’s HOPE;
     2. A Party breaches or violates any of the provisions of the Agreement; and
     3. A Party causes unreasonable delay or official inaction in the implementation of the Projects that will irretrievably prejudice the **AGENCY**. For this purpose, unreasonable delay shall mean a length of thirty (30) calendar days from the commencement of the procurement activities without justifiable reasons.
  2. The right to terminate or rescind this Agreement by a Party not at fault may be made by serving a Notice of Termination at least thirty (30) days before the date of the intended termination.

**ARTICLE 10**

**GOOD FAITH**

The Parties undertake to act in good faith with respect to each other’s rights under this Agreement and to adopt all reasonable measures to ensure the realization of the objectives of this Agreement.

**ARTICLE 11**

**DISPUTE RESOLUTION**

All disputes, controversies or claims arising out of or relating to this Agreement shall first be mutually resolved. Unresolved disputes or issues shall be resolved before the Office of the Solicitor General pursuant to the Rules on Alternative Dispute Resolution for Disputes between National Government Agencies.

**ARTICLE 12**

**GOVERNING LAW**

This Agreement shall be governed by and construed in accordance with the laws of the Republic of the Philippines. Any action brought to enforce or interpret this Agreement shall be brought in the courts of the City of Manila to the exclusion of all other courts.

**ARTICLE13**

**ENTIRE AGREEMENT AND INTERPRETATION**

This Agreement contains the entire agreement of the Parties with respect to its subject matter, and there are no other promises or conditions in any other agreement/s, whether oral or written. This Agreement supersedes any prior written or oral agreements between the Parties with respect to its subject matter.

The titles to the paragraphs of this Agreement are solely for the convenience of the Parties and shall not be used to explain, modify, simplify, or aid in the interpretation of the provisions of this Agreement.

**ARTICLE 14**

**AMENDMENT**

This Agreement may be modified or amended. Any amendment or modification must be in writing and signed by both Parties.

**ARTICLE 15**

**SEVERABILITY**

If any provision of this Agreement shall be declared invalid or unenforceable for any reason, the remaining provisions shall continue to be valid and enforceable. If a court finds that any provision of this Agreement is invalid or unenforceable, but by limiting such provision it would become valid or enforceable, such provision shall be deemed to be written, construed, and enforced as so limited.

**ARTICLE 16**

**NON-WAIVER OF RIGHT**

The failure of either Party to enforce any provision of this Agreement shall not be construed as a waiver or limitation of that Party’s right to subsequently enforce and compel strict compliance with every provision of this Agreement.

**IN WITNESS WHEREOF**, the Parties to this Agreement have hereto set their hands on the date and place stated above.

|  |  |
| --- | --- |
| **[State Full Name of AGENCY]**  By:  **(name)**  (representative) | **Procurement Service**  By:  **BINGLE B. GUTIERREZ**  Executive Director |

SIGNED IN THE PRESENCE OF:

|  |  |
| --- | --- |
| **(name)**  (position, office) | **JOELE H. EAYTE**  Director, Procurement Group 1 |

**ACKNOWLEDGMENT**

**REPUBLIC OF THE PHILIPPINES )**

**CITY OF MANILA ) S.S**

**BEFORE ME**, a Notary Public for and in the City of Manila, this \_\_ day of \_\_\_\_\_ 20\_\_\_ appeared the following persons presenting to me their respective identifications, to wit:

|  |  |  |
| --- | --- | --- |
| **Name** | **Competent Evidence of Identity** | **Date & Place of Issue** |
| **(name)**  (representative) |  |  |
| **BINGLE B. GUTIERREZ**  Executive Director |  |  |

known to me and to me known to be the same persons who executed and voluntarily signed the foregoing Memorandum of Agreement which they acknowledged before me as their own free and voluntary act and deed and with full authority to sign in that capacity.

This instrument refers to the Memorandum of Agreement and consisting of nine(9) pages including this page where the Acknowledgment is written, duly signed by the parties and their instrumental witnesses thereof.

**WITNESS MY HAND AND SEAL** on the date and place above-written.

Doc. \_\_\_\_\_;

Page \_\_\_\_\_;

Book \_\_\_\_\_;

Series of 2018.